

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JOSHUA NEWPORT,

Plaintiff,

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CITY OF SPARKS, a municipal corporation;
OFFICER E. MARCONATO, OFFICER B.
YEE, OFFICE ROWE, OFFICER LAKE,
SERGEANT TRACY,

Defendants.

Case No. 3:12-cv-00621-MMD-WGC

ORDER

(Def's Motion for Summary Judgment –
dkt. no. 76)

I. SUMMARY

Plaintiff Joshua Newport (“Newport”) was arrested for suspected vehicle theft after he attempted to evade law enforcement in a vehicle and on foot. He claims the arresting officers used excessive force in securing his arrest and sues the officers (“Officers”), as well as their employer, the City of Sparks (“Sparks” or “the City”). Before the Court is Defendants’ Motion for Summary Judgment (“Motion”). (Dkt. no. 76.) Plaintiff filed a response (dkt. no. 85) and Defendants filed a reply (dkt. no. 86.) For the reasons set out below, Defendants’ Motion is granted in part and denied in part.

II. BACKGROUND

Newport brings this suit, *pro se*, alleging that several officers of the Sparks Police Department (“Sparks PD”) violated his constitutional rights when they used force to arrest him. The following facts are undisputed, except when otherwise noted.

1 On November 28, 2010, Sparks PD located a vehicle that had been reported
2 stolen in the parking garage of the Nugget Casino (“the Nugget”). Sparks dispatch
3 cautioned that the suspect, Newport, was believed to be armed and dangerous. (Dkt. no.
4 76 at 11.) Several Sparks police officers arrived at the Nugget and began setting up a
5 perimeter around the parking garage. (*Id.*) While they were establishing a perimeter,
6 Newport drove the car out of the garage. (*Id.*) Four police vehicles, driven by the
7 Officers, followed him with their lights and sirens activated. (Dkt. no. 76 at 11; dkt. no. 85
8 at 7.) The Officers employed a precise immobilization technique (“PIT maneuver”);
9 Newport lost control of his car, and crashed into an oncoming police cruiser. (Dkt. no. 85
10 at 7.) A second police cruiser then crashed into Newport’s vehicle from behind. (*Id.*)

11 Officer Marconato approached Newport’s vehicle with his gun drawn, and
12 Newport attempted to flee from the scene. (*Id.* at 8.) Officer Marconato ordered Newport
13 to stop, and Newport complied. (*Id.*) Officer Rowe then tackled Newport to the ground.
14 (*Id.*) Newport, at least to some extent, struggled and fought with Officer Rowe and the
15 other Officers as they came to Officer Rowe’s aid. (*Id.* at 27-30; dkt. no. 76-10 at 16-17.)
16 Officer Rowe placed Newport in what is alternately described as a headlock or a
17 chokehold. (*Id.*; dkt. no. 45 at 5.) Newport briefly lost consciousness due to being
18 choked. (Dkt. no. 45 at 6-7.) Officer Yee placed his knee on Newport’s back and struck
19 him in the ribs while attempting to place Newport’s hands behind his back. (Dkt. no. 85 at
20 8.) Officer Marconato holstered his weapon and sat on Newport’s legs and helped place
21 Newport’s hands behind his back. (*Id.*)

22 While the officers were attempting to place Newport in handcuffs, Officer Lake
23 warned that he was going to fire his taser, and then did so. (*Id.* at 9; dkt. no. 76 at 25.)
24 The taser’s electrodes struck Newport in his abdomen. (Dkt. no. 45 at 6). The parties
25 have differing versions of the events that followed. Defendants claim that Newport
26 continued to struggle through the taser cycle and Officer Lake fired the taser a second
27 time, after which Newport became compliant and the Officers were able to apply
28 handcuffs. (Dkt. no. 75 at 25.) Newport claims that the Officers were able to put him in

1 handcuffs after firing the taser once, and that Officer Lake fired the taser a second time
2 while he was already handcuffed. (Dkt. no.45 at 6-7.)

3 In any event, Newport was then loaded into an ambulance and taken to Renown
4 Medical Center. (*Id.*) The paramedics' report indicates that Newport had abrasions and
5 swelling around his left eye, taser dart marks on his abdomen, and an obvious injury to
6 his right arm. (Dkt. no. 76-10 at 28.) A report from Renown Medical Center confirmed the
7 existence of abrasions and a right elbow injury and further indicates that Newport was
8 using methamphetamines. (Dkt. no. 85-4 at 2-3.) Newport subsequently pleaded guilty to
9 eluding a police officer and possession of a stolen motor vehicle, and was sentenced to
10 up to 120 months of imprisonment. (Dkt. no. 76 at 13.)

11 Newport filed this suit against Officers in their individual capacities and the City
12 under 42 U.S.C. § 1983, alleging the force used to arrest him was excessive in violation
13 of the Fourth Amendment.

14 **III. LEGAL STANDARD**

15 "The purpose of summary judgment is to avoid unnecessary trials when there is
16 no dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*,
17 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the
18 pleadings, the discovery and disclosure materials on file, and any affidavits "show there
19 is no genuine issue as to any material fact and that the movant is entitled to judgment as
20 a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is
21 "genuine" if there is a sufficient evidentiary basis on which a reasonable fact-finder could
22 find for the nonmoving party and a dispute is "material" if it could affect the outcome of
23 the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49
24 (1986). Where reasonable minds could differ on the material facts at issue, however,
25 summary judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th
26 Cir. 1995). "The amount of evidence necessary to raise a genuine issue of material fact
27 is enough 'to require a jury or judge to resolve the parties' differing versions of the truth
28 at trial.'" *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l*

1 *Bank v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). In evaluating a summary
 2 judgment motion, a court views all facts and draws all inferences in the light most
 3 favorable to the nonmoving party. *Kaiser Cement Corp.*, 793 F.2d at 1103.

4 The moving party bears the burden of showing that there are no genuine issues
 5 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In
 6 order to carry its burden of production, the moving party must either produce evidence
 7 negating an essential element of the nonmoving party’s claim or defense or show that
 8 the nonmoving party does not have enough evidence of an essential element to carry its
 9 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210
 10 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56’s requirements,
 11 the burden shifts to the party resisting the motion to “set forth specific facts showing that
 12 there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256.

13 The nonmoving party “may not rely on denials in the pleadings but must produce
 14 specific evidence, through affidavits or admissible discovery material, to show that the
 15 dispute exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and
 16 “must do more than simply show that there is some metaphysical doubt as to the
 17 material facts.” *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations
 18 omitted). “The mere existence of a scintilla of evidence in support of the plaintiff’s
 19 position will be insufficient.” *Anderson*, 477 U.S. at 252.

20 **IV. DISCUSSION**

21 **A. Factual Disputes**

22 Plaintiff makes inconsistent allegations as to whether he was actively resisting
 23 arrest. In his filings, Newport alternatively suggests that he was compliant and was
 24 attempting to surrender to the Officers (see dkt. no. 45 at 5; dkt. no. 85 at 70), and he
 25 fought back against the Officers (see dkt. no. 85 at 27-30.) Defendants have produced
 26 police reports and an affidavit from a third-party witness indicating that Newport fought
 27 back violently against the Officers. (See e.g. dkt. no. 76-9 at 10-14; dkt. no. 76-10 at 16-
 28 17.) For purposes of summary judgment, this Court need not credit Newport’s

1 inconsistent and overwhelmingly controverted claim that he did not fight back against the
 2 Officers. *Scott v. Harris*, 550 U.S. 372, 380 (2007) (a district court need not accept
 3 allegations that are “blatantly contradicted by the record, so that no reasonable jury
 4 could believe it.”)

5 The parties dispute the circumstances relating to the firing of the taser a second
 6 time. Newton claims that he was tasered a second time after he was already placed in
 7 handcuffs.¹ (Dkt. no. 45 at 6-7.) Defendants argue that because the record contradicts
 8 Newport’s claim, his claim should be discredited for purposes of opposing their Motion.
 9 (Dkt. no. 76 at 26.) In addition to the statements of the Officers, Defendants cite to a
 10 Taser Firing Report showing that the two cycles were discharged fifteen seconds apart
 11 and the statement of a third party witness stating that an ambulance arrived at the scene
 12 just as the Officers applied handcuffs to Newport. (*Id.* at 25-26.) Neither of these pieces
 13 of evidence is inconsistent with a scenario in which the Officers applied the taser to
 14 Newport after he was placed in handcuffs. It is unclear why it would take longer than
 15 fifteen seconds to apply handcuffs to Newport, especially when crediting his account that

16 ¹Newport’s version of the events is supported by his sworn Complaint and sworn
 17 response brief. (Dkt. nos. 45, 85.) These documents are treated like declarations and
 18 may be considered as evidence when evaluating summary judgment. See *Johnson v. Meltzer*, 134 F.3d 1393, 1400 (9th Cir. 1998) (“Like a verified complaint, a verified motion
 19 functions as an affidavit. Accordingly, the facts that [the plaintiff] set forth in his motion
 are evidence to be considered when deciding a motion for summary judgment.”)
 (citations omitted); *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004) (finding that
 20 courts must consider a *pro se* party’s contentions offered in motions and pleadings as
 evidence in his opposition to the motion for summary judgment “where such contentions
 21 are based on personal knowledge and set forth facts that would be admissible in
 evidence, and where [he] attested under penalty of perjury that the contents of the
 motions or pleadings are true and correct.”). Moreover, “declarations are often self
 22 serving, and this is properly so because the party submitting it would use the declaration
 to support his or her position.” *Nigro v. Sears, Roebuck and Co.*, 784 F.3d 495, 497 (9th
 23 Cir. 2015) (citing *S.E.C. v. Phan*, 500 F.3d 895, 909 (9th Cir. 2007) (holding that district
 24 court erred in disregarding declarations as “uncorroborated and self-serving”). The
 Court’s job in determining summary judgment is not to make credibility assessments
 25 about the evidence. “Although the source of the evidence may have some bearing on its
 credibility, and thus on the weight it may be given by a trier of fact, the district court may
 26 not disregard a piece of evidence at the summary judgment stage solely based on its
 self-serving nature.” *Id.* While the Court may disregard a self-serving declaration if only
 27 based on conclusions, Newport’s declarations contain factual statements based on his
 28 observations. Unlike Newport’s claims about resisting the Officers, his claim that he was
 tasered after being handcuffed is consistent throughout his filings.

1 he was compliant after the first taser firing. It is equally unclear why the arrival of an
 2 ambulance means that Officer Lake did not fire the taser a second time. Furthermore,
 3 Defendants' own evidence shows that an ambulance arrived only after Newport had
 4 complained of pain and the Officers removed his handcuffs in order to examine his arm.
 5 (Dkt. no. 76 at 12.) For the purposes of evaluating Defendants' Motion, this factual
 6 dispute must be resolved in Newport's favor.

7 **B. Qualified Immunity**

8 To prevail on his §1983 claim, Plaintiff must prove (1) that the conduct
 9 complained of was committed by a person acting under color of state law; and (2) that
 10 the conduct deprived him of a federal constitutional or statutory right. *Wood v. Ostrander*,
 11 879 F.2d 583, 587 (9th Cir. 1989). Here, it is undisputed that the individual Officers were
 12 acting under color of state law.

13 Because Defendants have invoked qualified immunity, the Court must go through
 14 a two-part inquiry. First, the Court must ask whether the facts, viewed in the light most
 15 favorable to Plaintiff as the non-moving party, establish a Fourth Amendment Violation.²
 16 If the answer is yes, then the Court must ask whether the law governing the claim was
 17 clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 121 (2001);
 18 *Robinson v. Solano Cnty.*, 278 F.3d 1007, 1013 (9th Cir. 2002). The Supreme Court has
 19 instructed that district judges may use their discretion in deciding which qualified
 20 immunity prong to address first based on the circumstances of the case at issue. See
 21 *Pearson v. Callahan*, 555 U.S. 223 at 232, 236 (2009). Moreover, "a district court should
 22 decide the issue of qualified immunity as a matter of law when 'the material, historical
 23 facts are not in dispute, and the only disputes involve what inferences properly may be
 24 drawn from those historical facts.'" *Conner v. Heiman*, 672 F.3d 1126, 1131 (9th Cir.
 25 2012) (quoting *Peng v. Mei Chin Penghu*, 335 F.3d 970, 979-80 (9th Cir. 2003)). Thus,
 26

27

 28 ²The Complaint also makes references to violations of the Eighth Amendment,
 however, the events Newport describes concern his arrest rather than his incarceration,
 and are therefore only cognizable under the Fourth Amendment.

1 when factual disputes exist on issues necessary to decide the issue of qualified immunity
 2 for excessive force, summary judgment is appropriate only if the defendants are entitled
 3 to qualified immunity on the facts as alleged by the non-moving party. *Blankenhorn v.*
 4 *City of Orange*, 485 F.3d 463, 477 (9th Cir. 2007).

5 The Court will address both prongs of the qualified immunity inquiry.

6 **1. Whether the Individual Defendants Violated Newport's Rights**

7 To determine whether the use of force by the law enforcement officers was
 8 excessive under the Fourth Amendment, a court must assess whether it was objectively
 9 reasonable "in light of the facts and circumstances confronting [the officers], without
 10 regard to their underlying intent or motivation." *Graham v. Conner*, 490 U.S. 386, 397
 11 (1989). "Determining whether the force used to effect a particular seizure is 'reasonable'
 12 under the Fourth Amendment requires a careful balancing of the nature and quality of
 13 the intrusion of the individual's Fourth Amendment interests against the countervailing
 14 governmental interests at stake." *Id.* at 396 (internal quotations omitted). In this analysis,
 15 the Court must consider the following factors: (1) the severity of the crime at issue; (2)
 16 whether Newport posed an immediate threat to the safety of the officers or others; and
 17 (3) whether Newport actively resisted arrest. *Id.*; see also *Arpin v. Santa Clara Valley*
 18 *Transp. Agency*, 261 F.3d 912, 921 (9th Cir. 2001). The Ninth Circuit has also instructed
 19 that the "quantum of force" used to arrest the plaintiff may be a relevant factor. *Luchtel v.*
 20 *Hagemann*, 623 F.3d 975, 980 (9th Cir. 2010). The quantum of force factor is useful in
 21 this case, where the Officers used various methods of force to arrest Newport. While
 22 these factors act as guidelines, "there are no per se rules in the Fourth Amendment
 23 excessive force context." *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc).

24 The Ninth Circuit has repeatedly recognized that excessive force cases are rarely
 25 suited for summary judgment. "Because [the excessive force inquiry] nearly always
 26 requires a jury to sift through disputed factual contentions, and to draw inferences
 27 therefrom, we have held on many occasions that summary judgment or judgment as a
 28 matter of law in excessive force cases should be granted sparingly." *Santos v. Gates*,

1 287 F.3d 846, 853 (9th Cir. 2002); see also *Liston v. County of Riverside*, 120 F.3d 965,
 2 976 n. 10 (9th Cir. 1997) (as amended) (“We have held repeatedly that the
 3 reasonableness of force used is ordinarily a question of fact for the jury.”).

4 **a. Severity of Crime at Issue**

5 Newport was suspected of, and later pleaded guilty to, possession of a stolen
 6 vehicle and eluding a police officer.³ These offenses, while serious, may not necessarily
 7 be dangerous. However, fleeing in a vehicle at high speeds to avoid law enforcement as
 8 Newport did here presented a dangerous situation. The Supreme Court and the Ninth
 9 Circuit have repeatedly recognized that a high speed chase can pose “grave public
 10 safety risk[s].” *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014); *Bingue v. Prunchak*,
 11 512 F.3d 1169, 1176 (9th Cir. 2008) (“the sheer velocity of a high-speed chase
 12 necessarily converts each situation into a genuine emergency.”). Based on these facts,
 13 the Court finds that the crimes at issue were relatively severe.

14 **b. Threat to Police Officers**

15 The officers at the scene were advised that Newport should be considered armed
 16 and dangerous. (Dkt. no. 76 at 11.) Newport had a history of encounters with the Sparks
 17 PD. Every officer at the scene had previously been involved with either domestic
 18 violence calls or SWAT raids focused on Newport. (*Id.* at 16-17.) In addition, Newport
 19 was attempting to flee in his vehicle and crashed into a police car at the scene. Based
 20 on these facts, the Court finds that the Officers would be objectively reasonable in
 21 believing that Newport posed a threat to their safety.

22 **c. Resisting Arrest**

23 Newport does not dispute that he fled law enforcement in a vehicle and on foot.
 24 As discussed, Newport has argued, with some inconsistency, that he did not resist the

25 ³Newport was also wanted on at least two other outstanding warrants. (Dkt. no.
 26 76-9 at 11.) It is unclear, however, whether the Officers were aware of those warrants.
 27 Newport argues that he did not steal the car in question, and that Sparks PD engaged in
 28 a conspiracy to produce a fraudulent police report regarding the stolen vehicle. (Dkt. no.
 85 at 6.) This allegation is unsupported by evidence and also belied by Newport’s guilty
 plea.

1 Officers attempting to arrest him. (See *supra* at Sect. IV(A).) This argument is
 2 undermined by his own response brief and by the evidence Defendants have offered in
 3 support of their Motion. (See, e.g., dkt. no. 85 at 27-30; dkt. no. 76-9 at 10-14; dkt. no.
 4 76-10 at 16-17.) Therefore, the Court finds that Newport was actively resisting arrest.

5 **d. Quantum of Force**

6 Viewing the evidence in the light most favorable to Newport, Defendants used the
 7 following force to arrest him: a PIT maneuver; brandishing firearms, a tackle, multiple
 8 kicks and punches, a headlock or chokehold, and two deployments of a taser.

9 **i. PIT Maneuver**

10 It is undisputed that Newport was fleeing law enforcement in his vehicle and
 11 driving at high speeds as he left the parking lot of the Nugget. Therefore, even if the
 12 Officers did employ a tactical maneuver in order to run him off the road, they were within
 13 the bounds of appropriate force clearly set out by the United States Supreme Court. "A
 14 police officer's attempt to terminate a dangerous high-speed car chase that threatens the
 15 lives of innocent bystanders does not violate the Fourth Amendment, even when it
 16 places the fleeing motorist at risk of serious injury or death." *Scott*, 550 U.S. at 386.
 17 Defendants are entitled to summary judgement on this part of Newport's claim.

18 **ii. Brandishing Firearms**

19 While brandishing a firearm may, in some circumstances, allow a reasonable
 20 fact finder to conclude that an officer has used excessive force in detaining a suspect,
 21 this is not such a case. The Officers were informed that Newport was believed to be
 22 armed and dangerous. Newport was suspected of stealing the vehicle that he crashed,
 23 and he admits to attempting to flee on foot. Under these circumstances, it was
 24 objectively reasonable for the Officers to draw their firearms. See *Anderson v. City of*
 25 *Bainbridge Island*, No. CV09-5797 RBL, 2010 WL 4723721, at *5 (W.D. Wash. Nov. 17,
 26 2010) aff'd, 472 F. App'x 538 (9th Cir. 2012) (objectively reasonable for officers to draw
 27 their guns on suspect who fled in vehicle); *Hinz v. City of Everett*, No. C10-0347-JCC,
 28 2010 WL 3212001, at *4 (W.D. Wash. Aug. 10, 2010) (reasonable for officer to draw his

1 gun based on belief suspect was armed). Defendants are similarly entitled to summary
2 judgment on this part of Newport's claim.

iii. Tackle, Punches, and Kicks

4 The parties generally agree that Officer Rowe tackled Newport and a number of
5 the other Officers then kicked, punched, or kneed Newport while attempting to pull his
6 hands behind his back and handcuff him. The parties also seem to agree that the
7 Officers stopped striking Newport once they were able to place him in handcuffs.

8 “Neither tackling nor punching a suspect to make an arrest necessarily constitutes
9 excessive force.” *Blankenhorn*, 485 F.3d at 477. The question is whether a juror could
10 find such force unreasonable under the circumstances. In *Blankenhorn*, the Ninth Circuit
11 held that a reasonable juror could find that officers’ gang tackling and punching an
12 uncooperative but non-threatening misdemeanor suspect was an unreasonable and
13 excessive use of force. Indeed, courts often deny summary judgment on behalf of
14 officers who have punched or kicked suspects when there is little or no evidence that the
15 suspect posed a threat, or if the suspect is already subdued. See, e.g., *Koiro v. Las*
16 *Vegas Metro. Police Dep’t*, 69 F. Supp. 3d 1061, 1069 (D. Nev. 2014) (denying summary
17 judgment where off duty officer pushed a suspect “from behind into the bushes and
18 began punching him in the stomach, sides and back of the head” with no reason to
19 believe there was an immediate threat to anyone’s safety); *Phelps v. Coy*, 286 F.3d 295,
20 302 (6th Cir.2002) (holding that a police officer’s tackling of a handcuffed suspect, hitting
21 him in the face twice, and banging his head on the floor three times, was
22 unconstitutional).

23 However, when a suspect is believed to be a threat based on objective evidence,
24 or when a suspect is violently resisting, officers who punched or kicked a suspect in
25 order to restrain them may be entitled to summary judgment on a subsequent excessive
26 force claim. See, e.g., *Husbands ex rel. Forde v. City of New York*, 335 F. App'x 124,
27 129 (2d Cir. 2009) (“One punch causing no injury to a suspect who is resisting being put
28 in handcuffs does not rise to the level of excessive force.”); *Williams v. Ingham*, 373 F.

1 App'x 542, 548 (6th Cir. 2010) (delivering closed-fist blows to suspect's back and
2 applying a taser after suspect resisted arrest following high speed car chase was
3 objectively reasonable); *Mobley v. Palm Beach Cty. Sheriff Dep't*, 783 F.3d 1347, 1355
4 (11th Cir. 2015) ("striking, kicking, and tasing the resisting and presumably dangerous
5 suspect in order to arrest him were not unreasonable uses of force" against suspect who
6 had led officers on high speed chase and struck an officer with his vehicle.)

7 Given that Newport had just crashed a stolen vehicle into a police car, attempted
8 to elude the Officers on foot, was thought to be armed and dangerous, and was resisting
9 the Officers' attempts to place him in handcuffs, the Court finds that no reasonable juror
10 could find several punches and kicks to amount to excessive force. This conclusion is
11 supported, importantly, by the fact that the Officers ceased striking Newport as soon as
12 he was restrained. Defendants' Motion is granted in relation to this part of Plaintiff's
13 claim.

14 **iv. Headlock or Chokehold**

15 Defendants deny that Newport was ever placed in a chokehold. Alternatively, they
16 argue that the chokehold was unintentional, and therefore did not amount to a
17 constitutional violation. (Dkt. no. 76 at 21-22.) As a third alternative, Defendants argue
18 that Officer Rowe was justified in using a chokehold, a technique that various courts
19 have described as lethal force, because he had reason to believe that Newport posed a
20 serious threat of harm. (Dkt. no. 86 at 13.) In sum, Defendants' argument is that a
21 chokehold was not used; if it was used, it was unintentional; and if intentional, it was
22 reasonable under the circumstances.

23 Defendants argue that Newport has not produced any evidence that Officer Rowe
24 placed him in a chokehold. (Dkt. no. 76 at 21) As discussed, *supra*, Newport has
25 produced two sworn documents (dkt. nos. 45, 85) alleging that Officer Rowe choked him.
26 This evidence is sufficient to create a genuine dispute about a material fact. In addition,
27 whether Officer Rowe choked Newport intentionally or unintentionally (if at all), and
28 whether he reasonably perceived that Newport presented a serious threat of harm, are

1 material questions of fact not appropriate for resolution at this stage. See *Blankenhorn*,
 2 485 F.3d at 477.

3 Finally, the Court cannot find, as a matter of law, that the undisputed facts clearly
 4 support the use of lethal force against Newport. If a jury found that Officer Rowe choked
 5 Newport intentionally, it could also find that choking him was an unreasonable use of
 6 force under the circumstances presented here. *Compare Coley v. Lucas Cty., Ohio*, 799
 7 F.3d 530, 541 (6th Cir. 2015) (“Chokeholds are objectively unreasonable where an
 8 individual is already restrained or there is no danger to others.”) *with Williams v. City of*
 9 *Cleveland, Miss.*, 736 F.3d 684 (5th Cir. 2013) (chokehold was reasonable on fleeing
 10 suspect who fought officers, didn’t respond to taser, and reached for officer’s gun).

11 Defendants have not shown a lack of genuine disputes of material facts in regards
 12 to Officer Rowe’s headlock or chokehold of Newport. Therefore, their Motion is denied as
 13 to this aspect of Plaintiff’s claim.

14 **v. Taser**

15 The Ninth Circuit has described tasers as a kind of “intermediate, significant level
 16 of force.” *Mattos v. Agarano*, 661 F.3d 433, 443 (9th Cir. 2011) (quoting *Bryan v.*
 17 *MacPherson* 630 F. 3d 805, 826 (9th Cir. 2010)). The Ninth Circuit has also held that,
 18 when evaluating whether the use of a taser is reasonable, an officer’s failure to warn that
 19 he or she is about to deploy the taser weighs in favor of finding the use of force
 20 unreasonable. *Id.* at 451.

21 Officer Lake gave a warning and fired his taser the first time as Newport was
 22 struggling with the other Officers. For many of the same reasons it was objectively
 23 reasonable for the Officers to kick and punch Newport to restrain him, it was objectively
 24 reasonable for Officer Lake to fire his taser the first time. This conclusion is further
 25 supported by the uncontested fact that Officer Lake warned Newport he was about to fire
 26 his taser.

27 Newport alleges that Officer Lake fired his taser a second time after Newport was
 28 subdued and placed in handcuffs. Defendants deny this claim, but do not argue that, if

1 true, it would constitute an unreasonable use of force. The Court agrees that firing a
 2 taser at a suspect after the suspect had been restrained, and was no longer posing a
 3 threat, qualifies as an objectively unreasonable use of force. Defendants have not shown
 4 that there is no genuine material issues of facts in regards to Officer Lake's second firing
 5 of the taser. Therefore their Motion is denied with respect to the firing of the taser a
 6 second time.

7 **2. Whether the Rights at Issue Were Clearly Established**

8 The Court has identified, based on a reading of the facts in the light most
 9 favorable to Newport, that a reasonable jury could find two instances of excessive uses
 10 of force in violation of the Fourth Amendment: a chokehold employed by Officer Rowe
 11 and the second taser firing by Officer Lake. The Court must next determine whether the
 12 law governing the claim was clearly established at the time of the violation. *Saucier*, 533
 13 U.S. at 121.

14 "A [g]overnment official's conduct violates clearly established law when, at the
 15 time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every
 16 reasonable official would have understood that what he is doing violates that right."
 17 *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011) (quotation marks and citation omitted).
 18 The Supreme Court has cautioned courts "not [to] define clearly established law at a
 19 high level of generality." *Id.* at 2084; see also *City & Cnty. of San Francisco v.*
 20 *Sheehan*, —U.S. —, —, 135 S.Ct. 1765 (2015). However, courts "do not require
 21 a case directly on point, but existing precedent must have placed the statutory or
 22 constitutional question beyond debate." *al-Kidd*, 131 S. Ct. at 2083.

23 The Court must ask whether a reasonable officer at the time in question would
 24 have known that employing a chokehold without a reasonable belief that a suspect
 25 posed a serious threat, and deploying a taser on a subdued suspect, were unreasonable
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1 uses of force in violation of the Fourth Amendment.⁴ The Court finds that the law is
2 clearly established that force may not be used in these situations.

The relevant standards for use of force, including lethal force, have long been established by *Graham* and *Tennessee v. Garner*, 471 U.S. 1 (1985). Courts have delineated the contours of the law governing the use of force necessary to effectuate an arrest — that is, a police officer cannot use unnecessary, let alone, intermediate and lethal force, on a suspect who has been restrained and no longer presenting an imminent danger to the officer's or others' safety. See, e.g., *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003) (officers who continued to press their weight on suspect who was handcuffed and lying on the ground, so that he had trouble breathing, employed force that was "clearly constitutionally excessive."); *Wade v. Fresno Police Dep't*, No. 1:09-CV-0599 AWI-BAM, 2012 WL 253252, at *15-16 (E.D. Cal. Jan. 25, 2012) aff'd, 529 F. App'x 840 (9th Cir. 2013) (collecting cases from other circuits discussing the use of tasers on handcuffed subjects); *Coley*, 799 F.3d at 541 ("Chokeholds are objectively unreasonable where an individual is already restrained or there is no danger to others").

17 Neither of the violations here concerns a nuanced area of law that would require
18 further clarification. *Saucier's* requirement that the asserted right be clearly established
19 "does not mean that the very action at issue must have been held unlawful before
20 qualified immunity is shed." *Wall v. County of Orange*, 364 F.3d 1107, 1111 (9th Cir.
21 2004). On the contrary, officers "can still be on notice that their conduct violates
22 established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741
23 (2002); see also *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 1997) ("Otherwise,
24 officers would escape responsibility for the most egregious forms of conduct simply
25 //

1 because there was no case on all fours prohibiting that particular manifestation of
 2 unconstitutional conduct.”).

3 **C. Municipal Liability**

4 The Supreme Court has held that a municipality can be liable under 42 U.S.C. §
 5 1983 if an official policy or custom directly caused the violation of an individual's
 6 constitutional rights. See *Monell v. Dep't of Social Services*, 436 U.S. 658, 690-91
 7 (1978). “It is only when the execution of the government's policy or custom . . . inflicts the
 8 injury that the municipality may be held liable under § 1983.” *City of Canton, Ohio v.*
 9 *Harris*, 489 U.S. 378, 385 (1989) (citations and internal quotations omitted). However, a
 10 municipality cannot be held liable just because it employs an officer who commits a
 11 constitutional tort. *Hervey v. Estes*, 65 F.3d 784, 791 (9th Cir. 1995) (citation omitted).
 12 The discretionary actions of municipal employees, even when unconstitutional, generally
 13 are not chargeable to the municipality under § 1983. *Gillette v. Delmore*, 979 F.2d 1342,
 14 1347 (9th Cir. 1992). Indeed, a single constitutional deprivation ordinarily is insufficient to
 15 establish a longstanding practice or custom. See *Christie v. Iopa*, 176 F.3d 1231, 1235
 16 (9th Cir. 1999) (citations omitted).

17 **1. Policies**

18 Newport has not offered any evidence connecting the alleged unconstitutional
 19 conduct with the City's policies. Defendants have produced policies evidencing that
 20 Sparks police officers are only allowed to use chokeholds in instances where deadly
 21 force would be authorized, and only then as a last resort. (Dkt. no. 76-10 at 36.)
 22 Defendants have also produced policies specific to the use of tasers. These policies limit
 23 the use of tasers to dangerous persons or situations, and specifically instruct officers to
 24 consider whether their target is handcuffed. (Dkt. no. 76-10 at 45). In short, the City's
 25 policies do not appear to be connected with the violations at issue, and Newport has not
 26 offered a plausible theory supporting any connection.

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28 ///

2. Failure to Train

2 “[T]he inadequacy of police training may serve as the basis for § 1983 liability only
3 where the failure to train amounts to deliberate indifference to the rights of persons with
4 whom the police come into contact.” *City of Canton*, 489 U.S. at 388. To show deliberate
5 indifference in this case, Plaintiff must demonstrate that the City “was on actual or
6 constructive notice that its omission would likely result in a constitutional violation.” See
7 *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1145 (9th Cir. 2012) (citations and internal
8 quotations omitted). Though not required, “a pattern of similar constitutional violations by
9 untrained employees is ordinarily necessary to demonstrate deliberate indifference.” *Id.*
10 (citations and internal quotations omitted).

a. Tasers

12 The City trains officers on when and how to use tasers, and Officer Lake received
13 training. (Dkt. no. 86 at 20-21.) Newport has not identified how a failure in training
14 caused Officer Lake to fire his taser after Newport was allegedly restrained. Nor has
15 Newport identified a pattern of similar violations, or any other reason the City would have
16 been on notice. Indeed, Newport intimates that Officer Lake fired the taser a second time
17 as a punitive measure. This is the type of discretionary action contemplated by *Gillette*
18 and *Christie*, rather than the type of action resulting from a failure to train contemplated
19 by *City of Canton*.

b. Chokeholds

21 The City does not train its officers on the technique of applying chokeholds, but
22 rather it classifies chokeholds as deadly force and allows officers to utilize them only in
23 the face of death or serious bodily injury. (*Id.* at 21-22.) Newport argues this position
24 amounts to a lack of training under *City of Canton*. While it is true that the City does not
25 train its officers *how* to employ a chokehold, it does train its officers *when* to use it.
26 Newport's injury is grounded on a theory that Officer Rowe employed a chokehold when
27 he was not authorized to do so — that is, he employed a chokehold when he did not
28 have a reasonable basis for believing he or his colleagues were in danger of death or

1 great bodily harm. Newport's injury is not based on a theory that Officer Rowe used
2 improper techniques in choking him. Therefore, there is no connection between the
3 City's training methods as they relate to chokeholds and the injury in this case.

4 **V. CONCLUSION**

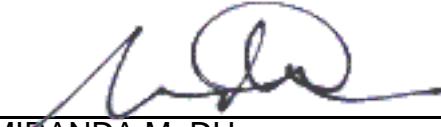
5 The Court notes that the parties made several arguments and cited to several
6 cases not discussed above. The Court has reviewed these arguments and cases and
7 determines that they do not warrant discussion as they do not affect the outcome of
8 Defendants' Motion.

9 It is ordered that Defendants' Motion for Summary Judgment (dkt. no. 76) is
10 granted in part and denied in part.

11 The Motion is granted as to Newport's claims against the City of Sparks, Officer
12 Marconato, Officer Yee, and Sergeant Tracy. The Clerk is directed to enter judgment in
13 favor of these Defendants.

14 The Motion is denied with respect to Officer Rowe as to his use of the chokehold
15 and Officer Lake as to his second firing of the taser.

16 DATED THIS 28th day of March 2016.

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18 
19 MIRANDA M. DU
20 UNITED STATES DISTRICT JUDGE
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